

STATE OF MICHIGAN
COURT OF APPEALS

MARIE DEAN, Personal Representative of the
Estates of TALEIGHA MARIE DEAN, AARON
JOHN DEAN, CRAIG LOGAN DEAN, and
EUGENE SYLVESTER,

Plaintiff-Appellant,

v

JEFFREY CHILDS and ROYAL OAK
CHARTER TOWNSHIP,

Defendants-Appellees,

and

FRANK MILES, JR., FRANCES THURMAN,
JERRY SADDLER, and CYNTHIA PHILLIPS,

Defendants.

UNPUBLISHED
October 3, 2006

No. 268921
Oakland Circuit Court
LC No. 01-029844-NO

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's final order dismissing this case in its entirety. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Because this is the second time this case has been presented to this Court we dispense with the restatement of the factual events which form the genesis of the claim and move directly to the legal issues presented.¹

¹ For a complete recitation of the facts presented in this case see *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004).

Plaintiff, as personal representative of the children's estates, filed suit, naming as defendants Childs, the Township, and Township trustees Miles, Thurman, Saddler, and Phillips. Plaintiff's original and amended complaint alleged deprivation of civil rights without due process pursuant to 42 USC 1983 (Count I), and gross negligence (Count II). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff failed to state a cause of action under § 1983, that the individual defendants were entitled to the defense of qualified immunity as to the § 1983 claim, and that the individual defendants were entitled to governmental immunity pursuant to MCL 691.1407 as to the state law claims. The trial court observed that the evidence could support a finding that the actions of the firefighters, including Childs, increased the danger to which the children were exposed, and denied summary disposition of plaintiff's § 1983 and gross negligence claims against the Township and Childs. The trial court dismissed all claims against the Township trustees on the ground that the trustees were entitled to absolute immunity as elected legislators.

Plaintiff filed a third amended complaint alleging deprivation of civil rights under § 1983 (Count I against Childs and the Township), and gross negligence (Count II against Childs). Childs and the Township moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that, at a minimum, Childs was entitled to summary disposition based on his qualified immunity from suit under § 1983. The trial court granted summary disposition in favor of Childs on the ground that at the time the fire occurred, there was no clearly established constitutional right to any particular level of competence in firefighting, and that a reasonable person could not have concluded that his conduct was unlawful in the constitutional sense. In a clarifying decision, the trial court stated that the failure to train claim against the Township remained viable. After these decisions, plaintiff's § 1983 claim against the Township and her state law gross negligence claim against Childs were allowed to proceed.

We denied defendants' application for failure to persuade of the need for immediate appellate review. In lieu of granting defendants' application for leave to appeal, our Supreme Court remanded the matter to this Court for consideration as on leave granted. Plaintiff did not file a cross-appeal as of right of the trial court's dismissal of the § 1983 action against Childs.

In *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), another panel of this Court affirmed in part, reversed in part, and remanded for further proceedings. The *Dean* Court reversed the trial court's denial of summary disposition of plaintiff's § 1983 claim against the Township, noting that plaintiff's allegation that the Township's actions demonstrated deliberate indifference to the safety of others was insufficient to meet the requirement of a § 1983 state-created danger claim. *Id.* at 53-57. The *Dean* Court affirmed the trial court's denial of summary disposition of plaintiff's state law claim of gross negligence against Childs, finding that plaintiff's evidence, if believed, would show that the children would have survived the fire had Childs not acted in a grossly negligent manner. *Id.* at 57-59.

In a peremptory order, our Supreme Court, in lieu of granting leave, reversed in part this Court's judgment and remanded this matter to the trial court for entry of an order granting Childs' motion for summary disposition of plaintiff's state law claim. 474 Mich 914; 705 NW2d 344 (2005).

Subsequently, the trial court granted Childs' motion for summary disposition of plaintiff's state law claim. The order resolved the last pending claim, and dismissed the case in

its entirety and with prejudice. Plaintiff claimed an appeal from the trial court's final order, but in fact seeks to challenge the trial court's earlier orders granting Childs' motion for summary disposition of plaintiff's § 1983 claim against him.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. A question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997).

Plaintiff's assertion that the trial court erred by granting summary disposition in favor of Childs on her § 1983 claim is barred by the law of the case doctrine. Plaintiff did not pursue a cross-appeal when this case was remanded for consideration as on leave granted, and the *Dean* Court noted that plaintiff had not challenged the rulings that were adverse to her. *Dean, supra* at 52 n 3. The *Dean* Court held that plaintiff failed to state a claim under § 1983 against the Township because her assertion that the Township exhibited deliberate indifference to the safety of others did not state a cause of action under the state-created danger theory. *Id.* at 57. The *Dean* Court specifically addressed the issue whether plaintiff stated a claim under § 1983 on which relief could be granted, and answered that question in the negative. *Webb, supra*. The decision in *Dean, supra*, regarding plaintiff's failure to state a claim under § 1983 applies with equal force to her claim against Childs, and the instant appeal is therefore without merit.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen